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Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. [redacted] 69

BERNARD M. SHOTKIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO, ex rel. THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO AND BRIEF IN SUPPORT OF PETITION.

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30 North La Salle Street,
Chicago, Illinois,
Attorney for Petitioner.

CHAMPLIN-SWEALY COMPANY, CHICAGO

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioner, Bernard M. Shotkin, respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of the State of Colorado.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

In the case of *Shotkin* v. *Kaplan,* 116 Colo. 296 (1947), page 229, the Supreme Court of Colorado said as to the petitioner:

> "(4) that thenceforth Shotkin, appearing other than by counsel, shall desist from instituting actions

> in Colorado state trial courts, and from prosecuting writs of error here; (5) that all cases pending at *nisi prius*, or here, in which Shotkin is plaintiff or plaintiff in error, and appears *pro se*, and in which he does not proceed reasonably to employ counsel to represent him, shall be subject to dismissal." (Rec. 5.)

The court at the same time said: "There is not involved here the right of a party to represent himself when made defendant or defendant in error." The above statements are re-stated in *Shotkin* v. *Lindsley*, 118 Colo. 224.

Attention may be called to the fact that the statement is not applied to defenses; that as to a complaint there must be a process "reasonably to employ counsel to represent him", and that the failure to do so will make the complaint "subject to dismissal".

Petitioner, who operates a store in Denver, Colorado, dealing in electrical appliances and fixtures, had regularly paid a state sales tax upon sales made in the State of Colorado and was in 1948 sought to be taxed some $5000 for previous wholesale transactions and transactions without the state and with reference to articles never within the state (Rec. 33, 47, 50), the petitioner's store being kept closed for several months and its renewed operation thereafter being obtained only by the payment of such illegal tax (Rec. 31, 35, 47).

With respect to the issues presented by the sales tax imposed upon transactions entirely in other states, petitioner, aware of an attitude of lawyers occasioned by the previous statement by the Supreme Court of Colorado, sought to obtain an attorney to represent him, interviewing unsuccessfully 150 attorneys, the Denver Bar Association, and the Denver Legal Aid (Rec. 48). He finally found an attorney who appeared for him in several of the first court proceedings, but who subsequently withdrew without notice to petitioner (Rec. 51, 52).

With respect to the transactions here involved it is obvious that petitioner sought "reasonably to employ counsel to represent him" (Rec. 5, Par. 10), and that such counsel did represent him twice in proceedings in which such representation is denied by respondent (Rec. 52, 2-3).

The proceeding here brought by respondent relates to the sales tax issue heretofore referred to, and as to which the state trial court said:

> "The Court feels this way about that matter: I think perhaps you have an interest in this matter really as a defendant, that you were appearing to defend against what you claim to be an illegal tax; that in a measure your rights appear to be the rights of a defendant, and that I don't think the case of *Shotkin* v. *Kaplan* is controlling in this particular matter" (Rec. 54, 60).

Upon reference to the same problem and to the same issue, a Judge of the United States District Court before whom the matter was presented cited the above-noted case of *Shotkin* v. *Kaplan,* and said "that respondent was actually a defendant defending himself against the Tax Collector's deficiency sales tax assessment, even though he had to title himself plaintiff" (Rec. 56).

This case is a complaint in contempt, criminal in character, brought by the Attorney General of the State of Colorado, and limited to appearance, by petitioner, either personally or by filing, in court proceedings regarding a state tax charged against him (Rec. 2-5). It is one of the duties of the attorney general to commence action for the recovery of state sales taxes (Colo. Statutes Annotated, ch. 144, sec. 25(g)). The complaint was filed on June 10, 1948, and was promptly received by the Supreme Court of Colorado on June 10, 1948 (Rec. 1).

Upon three occasions petitioner moved that the State Supreme Court appoint counsel for him in the contempt

proceedings, subject to fees to be fixed by the Court; and the Court rejected his motion in each case (Rec. 7, 8, 30, 33, 61, 62). He was also unsuccessful in seeking witnesses in open court, with oral argument (Rec. 10, 16).

On December 12, 1949, the Supreme Court of Colorado issued the following judgment, which is the basis of the present petition:

"Original Proceeding.

Judgment—December 12, 1949.

> At this time the cause coming on to be heard upon the rule heretofore entered requiring said respondent to show cause why he should not be punished for contempt and also the argument of counsel thereon; the Court being fully advised in the premises, it is accordingly adjudged that the respondent is guilty of contempt of this Court, and it is ordered that the motion for summary judgment be sustained. It is further ordered and adjudged that the respondent is guilty of contempt of Court as charged herein, and that he be confined in the County Jail of the City and County of Denver for and during the period of sixty days; provided, that execution herein shall be stayed until the further order of the Court.

En Banc, December 12, 1949" (Rec. 75).

Attention may be called to the fact that there was no counsel who could argue for the petitioner.

This Court Has Jurisdiction.

Jurisdiction of this Court is invoked under Section 1257(3) of the Judicial Code (28 U. S. C. A., Section 1257(3)), with respect to a judgment rendered by the highest court of a state in which a decision could be had.

There are special and important reasons for the granting of review on writ of certiorari (Supreme Court Rule 38, par. (5)).

The enforcement of the judgment is stayed by action of the Chief Justice of the court rendering the judgment, in compliance with Section 2101(e) of Title 28, United States Code (Rec. 76).

The time for filing petition for writ of certiorari is extended to and including May 10, 1950, in compliance with Section 2101(c) of Title 28, United States Code (Rec. 77).

Jurisdiction is clear in that it involves issues both of due process of law and equal protection of laws under the 14th Amendment (Rec. 9).

The Questions Presented.

1. Is this a proceeding of criminal contempt of court?

2. If so, may the court ignore the proceedings ordinarily required in such a case?

3. If the procedure were criminal, had the court defined the offense so that it might be known to be criminal by those subject to it?

4. Has the Supreme Court of the State of Colorado distinguished properly between plaintiff and defendant?

5. Although affecting only one person, the judgment in this case, if sustained, may be made applicable to others. Can the court deprive a person of his rights because he has not obtained counsel after a serious effort to do so? And can it do so on the ground that he must act as plaintiff in a transaction in which he is really defending against a state tax on the ground of its inapplicability?

Reasons Relied Upon for Allowance of Writ.

1. The Supreme Court of the State of Colorado erred in holding that the trial as criminal contempt should have no restrictions as such.

2. The Supreme Court of the State of Colorado erred in refusing counsel, and trial in open court, to petitioner.

3. The Supreme Court of the State of Colorado erred in its classification of plaintiffs and defendants.

Respectfully submitted,

WALTER F. DODD,
Attorney for Petitioner.

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vs.

THE PEOPLE OF THE STATE OF COLORADO, ex rel. THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Judgment Below.

The judgment in this case was the result of an original proceeding, and was entered on December 12, 1949, without an opinion. The judgment is printed on page 75 of the Transcript and is also printed in 212 Pac. 2d, 1007.

Jurisdiction.

Jurisdiction of this Court is invoked under Section 1257(3) of the Judicial Code (28 U. S. C. A., Section 1257(3)), with respect to a judgment rendered by the highest court of a state in which a decision could be had.

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Statement of the Case.

In the case of *Shotkin* v. *Kaplan*, 116 Colo. 296 (1947), page 229, the Supreme Court of Colorado said as to the petitioner:

> "(4) that thenceforth Shotkin, appearing other than by counsel, shall desist from instituting actions in Colorado state trial courts, and from prosecuting writs of error here; (5) that all cases pending at nisi prius, or here, in which Shotkin is plaintiff or plaintiff in error, and appears pro se, and in which he does not proceed reasonably to employ counsel to represent him, shall be subject to dismissal." (Rec. 5)

The court at the same time said: "There is not involved here the right of a party to represent himself when made defendant or defendant in error." The above statements are re-stated in *Shotkin* v. *Lindsley*, 118 Colo. 224.

Attention may be called to the fact that the statement is not applied to defenses; that as to a complaint there must be a process "reasonably to employ counsel to represent him;" and that the failure to do so will make the complaint "subject to dismissal."

Petitioner, who operates a store in Denver, Colorado, dealing in electrical appliances and fixtures, had regularly

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With respect to the transactions here involved it is obvious that petitioner sought "reasonably to employ counsel to represent him" (Rec. 5, Par. 10), and that such counsel did represent him twice in proceedings in which such representation is denied by respondent. (Rec. 52, 2-3).

The proceeding here brought by respondent relates to the sales tax issue heretofore referred to, and as to which the state trial court said:

> "The Court feels this way about that matter: I think perhaps you have an interest in this matter really as a defendant, that you were appearing to defend against what you claim to be an illegal tax; that in a measure your rights appear to be the rights of a defendant, and that I don't think the case of *Shotkin* v. *Kaplan* is controlling in this particular matter" (Rec. 54, 60).

Upon reference to the same problem and to the same issue, a judge of the United States District Court before whom the issue was presented cited the above-noted case of *Shotkin* v. *Kaplan,* and said "that respondent was actually a defendant in defending himself against the Tax Collector's deficiency sales tax assessment, even though he had to title himself plaintiff" (Rec. 56).

This case is a complaint in contempt, criminal in character, brought by the Attorney General of the State of Colorado, and limited to appearance, by petitioner, either personally or by filing, in court proceedings regarding a state tax charged against him (Rec. 2-5). It is one of the duties of the attorney general to commence action for the recovery of state sales taxes. (Colo. Statutes Annotated, ch. 144, sec. 25(g)). The complaint was filed on June 10, 1948 and was promptly received by the Supreme Court of Colorado on June 10, 1948 (Rec. 1).

Upon three occasions petitioner moved that the State Supreme Court appoint counsel for him in the contempt proceedings, subject to fees to be fixed by the Court; and the Court rejected his motion in each case (Rec. 7, 8, 30, 33, 61, 62). He was also unsuccessful in seeking witnesses in open court, with oral argument (Rec. 10, 16).

On December 12, 1949, the Supreme Court of Colorado issued the following judgment, which is the basis of the present petition:

"ORIGINAL PROCEEDING

Judgment—December 12, 1949

At this time the cause coming on to be heard upon the rule heretofore entered requiring said respondent to show cause why he should not be punished for contempt and also the argument of counsel thereon; the Court being fully advised in the premises, it is accord-

ingly adjudged that the respondent is guilty of contempt of this Court, and it is ordered that the motion for summary judgment be sustained. It is further ordered and adjudged that the respondent is guilty of contempt of Court as charged herein, and that he be confined in the County Jail of the City and County of Denver for and during the period of sixty days; provided, that execution herein shall be stayed until the further order of the Court. En Banc, December 12, 1949." (Rec. 75)

Attention may be called to the fact that there was no counsel who could argue for the petitioner.

Errors Relied Upon.

The Supreme Court of the State of Colorado erred in not complying with the requirements in criminal contempt; and in its distinction between plaintiff and defendant.

Summary of Argument.

There was no basis for a finding of guilt in the case of criminal contempt here tried as an original proceeding by the Supreme Court of the State of Colorado; and no basis for a classification of plaintiffs distinct from defendants when the one represents the same type of interest as the other.

ARGUMENT.

I.

The Case Is One of Criminal Contempt.

The distinction between civil and criminal contempt was well stated in *Gompers* v. *Buck's Stove & Range Company*, 221 U.S. 418 (1911), 445:

> "Proceedings for civil contempt are between the original parties, and are instituted and tried as a part of the main cause. But, on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause."

The proceeding here is obviously one of criminal contempt.

II.

Procedure in Criminal Contempt.

In *Gompers* v. *Buck's Stove & Range Company*, at page 444, the Court said:

> "Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself."

The present strength of the *Gompers* case is illustrated in *United States* v. *United Mine Workers of America*, 330 U.S. 258 (1947). Although Mr. Justice Rutledge dissented in that case, his statements and notes on pages 364-365 and 371-372 indicate the development of the principles of the

Gompers case. Speaking of this case, Mr. Justice Rutledge said, at page 371:

> "What is most important, because the application and observance of all these rights and others depend upon it, is that the person charged is entitled to know from the beginning, not merely at the end or some intermediate stage, in which sort of proceeding he is involved."

With respect to counsel in a criminal case, Mr. Justice Reed recently said for the Court in *Uveges* v. *Pennsylvania*, 335 U.S. 437 (1948):

> "Only when the accused refuses counsel with an understanding of his rights can the court dispense with counsel * * *. Only a waiver of counsel, understandingly made, justifies trial without counsel."

Having indicated the established principles with respect to criminal contempt, it is desirable to indicate their relation to the present case:

(1) Petitioner was denied representation by counsel (Rec. 7, 8, 30, 33, 61, 62) or witnesses in open court, with oral argument (Rec. 10, 16) in direct violation of established legal principles.

(2) The penalty in this case is sought and based upon an order by the Supreme Court of Colorado which appears on page 5 of the Record and which is supplemented by the statement that "There is not involved here the right of a party to represent himself when made defendant or defendant in error."

This Court said in *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of

> fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, 221, 34 S. Ct. 853, 58 L. Ed. 1284; *Collins* v. *Kentucky*, 234 U.S. 634, 638, 34 S. Ct. 924, 58 L. Ed. 1510."

A similar view was recently expressed in *Skinner* v. *State of Oklahoma*, 316 U. S. 535 (1942), and was noted as applied to contempt proceedings by Mr. Justice Rutledge in *United States* v. *United Mine Workers of America*, 330 U. S. 258 (1947), p. 371. Due process of law and equal protection of the laws under the Fourteenth Amendment should equally protect against judicial as well as against legislative results of the same character.

Several questions present themselves: (a) Does the state supreme court have an authority to grant an individual the right to appear in court as defendant without counsel; but to deny an individual all right to appear in court as plaintiff unless he appears by counsel, even though he has issues of the same character and has been unable to obtain counsel, the evidence here showing that he had important interests of similar character and was unable to appear by counsel? (Rec. 47, 48.) Does the classification properly distinguish plaintiffs and defendants, and is there a judicial power to make such a classification? (b) Where, as here, petitioner is defending against the application of a state tax law, but must himself bring suit, is the distinction one justifying a penalty against him if he appears without counsel? (c) If the trial court should recognize that petitioner has the rights of a defendant, as it did (Rec. 60) and that he may appear without counsel, would the penalty imposed upon him by the State Supreme Court

(Rec. 75) be justified, although the trial judge had authority to rule upon his position, and petitioner had right and duty to obey?

Attention may be called to the fact that the State Supreme Court by staying the operation of its sentence "until the further order of the Court" creates an undulating threat of an attainder character; that, while encouraging the lawyer in its original orders to the petitioner, it took an opposing view in a trial for the purpose of penalizing the petitioner; and that there is no charge that the petitioner had at any time behaved improperly in the presence of a court.

Respectfully,

WALTER F. DODD,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1949

No. 817

BERNARD M. SHOTKIN, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF COLORADO, ex rel, THE ATTORNEY GENERAL OF THE STATE OF COLORADO, RESPONDENT.

BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

SUMMARY OF ARGUMENT

There are *no* special and important reasons for granting of review on Writ of Certiorari (Supreme Court Rule 38, Par. 5), there being *no* Federal question of substance decided in the decision of the Supreme Court of the State of Colorado, (R. 75) 120 Colo. ——; 212 P. (2d) 1007) which is herein sought to be reviewed by petitioner's Petition for Writ of Certiorari (Sup. Ct. Rule 38, Par. 5 (a)). The question presented and determined by the Supreme Court of the State of Colorado was merely a

disciplinary matter to punish petitioner for violating the mandate of the Supreme Court of the State of Colorado, in the case of *Shotkin v. Kaplan,* 116 Colo. 295 (1947). Hence this Honorable Court does not have jurisdiction to entertain the petition for Writ of Certiorari.

ARGUMENT

I.

THE COURT DOES NOT HAVE JURISDICTION

In the case of *Shotkin vs. Kaplan,* 116 Colo. 295, 297, 297 (1947), the Supreme Court of Colorado made certain observations concerning this petitioner as follows:

> "Some further observations are in order, based whereon additional orders are justified. Bernard M. Shotkin is a business man, active, and seemingly successful. Moreover, there is every evidence that he is possessed of ample means with which to indulge his desire for litigation. *It appears that he goes in for it 'wholesale.' He has a multitude of cases pending* in the district court of Denver, some half dozen in the Denver county court, several here, some in the United States District Court for Colorado, as well as in the United States Circuit Court of Appeals for the Tenth Circuit, and, until recently, a case in the Supreme Court of the United States, which originated in Denver. For the most part, he has appeared pro se. Some of the cases grew out of previous ones in which he has been unsuccessful, and in which frequently he includes as parties defendant, lawyers who have opposed him in his fruitless attempt in earlier litigation, and sometimes those judges who have found it compatible with their judgment to rule adversely to him. *In short, Shotkin, proceeding largely sans lawyers, and otherwise more or less irregularly, interferes with the functioning of all the courts within the jurisdiction*

of Colorado, including ours, and materially impedes judicial progress. Much of our time in the last several months has been taken up with the consideration of features of writs of error obtained by him, which, for the most part, have no semblance of merit. We are a busy judicial tribunal, constantly engaged in examining, determining and adjudging causes presented for our consideration by writs of error prosecuted by counsel qualified, as well as disposed, to proceed in ample and understandable form. Shotkin has much of the learning of lawyers, but does not consider himself formally bound, as they are, to observe rules calculated to promote orderly and just administration of justice, and which he violates at pleasure. Were he a member of the bar, our disciplinary authority would enable us, proceeding thereunder, to meet the situation otherwise. *It follows, that, only by the requirement that he employ counsel, may we return to the normal consideration of duties to trial courts as well.* What Shotkin does out of court is not of our immediate concern, but in the interest of discharging our never ending judicial duties, we are justified in withholding from him the right to appear in advocacy of his own writs of error. Also, in furtherance of our over-all purpose, it is necessary that in all cases pending here, or at nisi, where Shotkin appears as plaintiff in error, or plaintiff, he should promptly retain counsel, failing which, motions to dismiss such writs and cases will be entertained and determined in the light of this opinion." (Emphasis supplied.)

The Transcript of Record in the case at bar illustrates the Shotkin technique in "practicing law." This is one of many cases in which this petitioner has appeared in the courts of Colorado and in Federal courts, not only before the *Shotkin v. Kaplan* decision but since. A cursory review of said transcript indicates that from June 17, 1948 to November 4, 1948, (an interval of four and one-half

months) this petitioner filed in the Supreme Court of Colorado, a total of fifteen motions and petitions, together with supporting briefs. In order to present a clear picture, said motions and petitions are hereinafter set forth, together with filing dates.

Motion for order appointing counsel for respondent	June 17, 1948
Motion to dismiss complaint and quash order to show cause	June 26, 1948
Respondent's motion to reopen the ex parte denial of his motion to dismiss, etc.	July 19, 1948
Respondent's motion for extension of time to file answer	July 19, 1948
Respondent's petition to be excused from filing written answer to complaint and order to show cause, etc.	August 20, 1948
Respondent's petition for appointment of an attorney to represent him	August 30, 1948
Respondent's motion for extension of time to answer motion to strike	September 2, 1948
Respondent's reply to answer to his motion for extension of time	September 13, 1948
Reply to motion to strike respondent's answer	September 24, 1948
Respondent's petition for extension of time to file amended answer to complaint and order to show cause	October 8, 1948
Motion to quash and dismiss order to show cause	October 14, 1948
Amended answer and return to complaint and order to show cause	October 14, 1948
Petition for appointment of an attorney to represent respondent	October 19, 1948
Respondent's answer to motion to strike	October 21, 1948
Respondent's motion to dismiss complaint and quash order to show cause	November 4, 1948

Most of said motions and petitions are long and voluminous and contain much scandalous and libelous matter directed against a great number of outstanding members of the bar of Colorado (R. 16, 17, 18, 19, 28, 29).

Further, said motions and petitions contain matters which are impertinent, disrespectful and contemptuous of the Supreme Court of Colorado and further illustrate petitioner's repeated refusal to accept and abide by the Court's order and in repeating the same requests a number of times. As was stated by the opinion in *Shotkin v. Kaplan, supra,* he has sued a number of attorneys "who have opposed him in his fruitless attempt in earlier litigation," and he has even sued certain judges "who have found it compatible with their judgment to rule adversely to him." We wish to point out that the motions referring to said attorneys contain matters which have not been verified by any of the attorneys against whom said remarks have been directed; and that they are mere allegations of petitioner.

In *Shotkin v. Burke, et al.,* Action No. 2471, in the United States District Court for the District of Colorado, this petitioner filed a complaint against members of the Supreme Court of the State of Colorado, the Attorney General of Colorado, the Deputy Attorney General, Assistant Attorney General, Revenue Director of Colorado and two employees of the Revenue Director. In this action petitioner asked that the defendants be restrained and enjoined from proceeding further *in the contempt case* then pending in the Supreme Court of Colorado and *now sought to be reviewed by the instant Petition for Certiorari.* On August 6, 1948, the Honorable Walter A. Huxman, United States District Court Judge, dismissed the action on the ground that "there is a complete absence of any federal question which would give this court jurisdiction of this case." The appeal in said case was dismissed by the Circuit Court of Appeals for the Tenth Circuit without a

written decision, said action appearing at 170 Fed. (2d) 368; and certiorari was denied by the Supreme Court of the United States in Case No. 219 Misc., appearing at 335 U. S. 888, 69 Sup. Ct. 231. Although Judge Huxman's opinion was not printed and published in Federal Supplement, the following quotations from said opinion are taken from the written opinion on file with the Clerk of the Court.

> "He requests this court to quash the order of the Colorado Supreme Court to petitioner to show cause why he should not be punished for contempt. He alleges that the Colorado Supreme Court has no jurisdiction of the cause, that petitioner will be denied due process and equal protection of the laws (in contravention of the Fourteenth Amendment), and that the proceeding in contempt is in the nature of an ex post facto law. He claims that since that action is criminal in nature he is entitled to a trial by jury and to the assistance of counsel, both of which he presumes he will be denied.
>
> "Petitioner states that the reason for his pursuit of actions pro se subsequent to the order of the Colorado Supreme Court in Shotkin v. Kaplan, supra, was because of a conspiracy practiced against him by his attorney and other members of the Denver Bar whom he approached in regard to the bringing of certain actions and the filing of various motions referred to in the complaint in contempt. He alleges that he asked the Colorado Supreme Court to appoint counsel for him in the contempt case, but that his motion therefor was denied. He pleads lack of funds. He claims that the refusal to appoint counsel is in violation of his rights under the Sixth Amendment to the Constitution of the United States and under Rules 14b, 15c and 44 of the Federal Rules of Criminal Procedure.

"Petitioner states that the hearing by the Colorado Supreme Court of this order to show cause is in violation of Rule 42b of the Federal Rules of Criminal Procedure, in that it involves disrespect to or criticism of a judge and that the same judge is, by that rule, disqualified from presiding at the hearing; that the hearing also is in violation of Rule 42b of the Federal Rules of Criminal Procedure in that petitioner will be denied a jury trial in a criminal contempt hearing.

• • • •

"Finally, petitioner requests this court to declare the order made by the Colorado Supreme Court in Shotkin v. Kaplan, supra, null and void because it allegedly violates the Constitution of Colorado and Section One of the Fourteenth Amendment to the Constitution of the United States. Specifically, petitioner alleges that under the original order he will be deprived of due process and equal protection of the laws in that he is prohibited from appearing in Colorado courts henceforth in propria persona; that if he attempts to do so, not being able to secure counsel, he will suffer the same or similar punishment in the future as that with which he is now threatened. He argues that such an order creates a monopoly of Colorado attorneys and deprives him of his constitutional right to represent himself and his three minor children in Colorado courts.

"Petitioner claims generally that the denial to him of his right to appear pro se in the courts of Colorado and the subsequent order to show cause for violation of that order is in violation of the "Civil Rights" law, (R. S. Sec. 1979, 8 U.S.C.A. Sec. 43), and the First, Fifth, Sixth, Fourteenth and Fifteenth Amendments of the Constitution of the United States.

• • • •

"His claim that he will be denied a right to a trial by jury in the contempt proceeding in the state court is also not well founded. His claim that a denial of this right is in violation of the Sixth Amendment and the due process clause of the Fourteenth Amendment is without foundation. It is generally sufficient to state that it has been universally held that the provisions of the Sixth Amendment do not control the states except with regard to those rights which are specifically guaranteed by the due process clauses of the Fourteenth Amendment. The right of an accused to a trial by jury in a criminal case is mentioned in the Federal Constitution. Denying one such a right in a state court is, however, not a fundamental right guaranteed by the due process clause of the Fourteenth Amendment.

"Even conceding that the right to a trial by jury is fundamental in a criminal proceeding, the same would not apply in the case of a proceeding in criminal contempt. Punishment for contempt may be summary whether the contempt is direct or indirect, civil or criminal. Due process does not require a jury trial in such a proceeding. Courts have inherent power to punish for contempt and may protect the court's dignity and enforce.

"Petitioner's contention that the order of the Supreme Court of Colorado denying him the right to proceed pro se in that court in his own litigation is a denial of due process under the Fourteenth Amendment requires more consideration. The question is, does such an order violate petitioner's substantive rights under the Fourteenth Amendment? If the right to appear pro se is an element of that due process and is a fundamental right guaranteed by the Federal Constitution, then it does present a federal question which gives this court jurisdiction. If, however, the right so to appear is not a fundamental right of due

process but instead is a mere matter of procedure, then how petitioner may be permitted to proceed in the state courts is for that court's determination under appropriate rules and regulations, and denying a litigant the right to proceed pro se would then raise no federal question.

• • • •

"The narrower point in this case is that *a court has right by reasonable rules and regulations to provide for orderly procedure not only generally but in specific cases.* The order which is sought to be enjoined clearly indicates that it was directed against petitioner because he refused to conform to the ordinary and regular rules laid down by the Supreme Court and the courts of Colorado pertaining to the conduct of hearings therein. If that is so, certainly the order is justified and the citation for contempt is proper. *This opinion is not based upon the narrower question that the manner in which one may be permitted to appear in a state court, whether pro se or whether by counsel, relates to procedure and must be determined according to the rules and orders of such a court and that denying one the right to appear pro se in a state court does not violate the due process clause of the Fourteenth Amendment* even if it be conceded that in the federal court a litigant has such a right. *The conclusion is, therefore, inescapable that the complaint fails to present a federal question and the court is without jurisdiction.*" (Emphasis supplied.)

There is little further authority on the right of an individual to prosecute actions pro se, but the following quotation from *Opinion of the Justices,* 289 Mass. 607, 194 N.E. 313, 317, indicates that the right involves procedure only, and is subject to restriction where the public interests so require:

"Individuals have been permitted to manage, prosecute or defend their own actions, suits, and proceedings, and to defend prosecutions against themselves *except when the public welfare demanded otherwise.* * * *" (Emphasis supplied.)

The following quotation from *Percy's Case,* 36 N. Y. 651, 652, while it involved the disbarment of an attorney, applies *a fortiori* to one representing himself *in propria persona*:

"* * * By whatever cause the conduct of the appellant was induced, it is clear, that it was such as wholly to unfit him to practice the profession usefully to the public or beneficially to himself. His credibility was destroyed; his character had become bad; he was crowding the calendar with vast numbers of libel suits, in his own favor, and in the habit of instituting additional libel suits upon the answers to those previously brought by him. In one instance, at least, he had sued his client in a justice's court, and when beaten upon trial, instead of appealing from the judgment, he commenced numerous other suits against him, in different towns, for the same cause, when he must have known that the demand was barred by the first judgment rendered. The only inquiry is, whether, in such a case, the court has the power to protect the public, by preventing such persons from practicing as attorneys and counsellors in the courts of the state, and by that means harass its citizens."

It must be assumed that the Colorado Supreme Court had grounds for its opinion in *Shotkin v. Kaplan, supra,* but if any confirmation is required it will be found in Judge Kennedy's opinion in *Thomas A. Edison, Inc. vs. Shotkin,* (D.C. Colorado), 69 Fed. Supp. 176; appeal dismissed, 163 Fed. (2d) 1020; certiorari denied and application for appeal denied, 332 U. S. 813; rehearing denied,

332 U. S. 839. (Compare *Shotkin v. Kennedy, Acting Judge,* Motion for leave to file writ of mandamus denied, 326, U. S. 684.)

Summarizing, certainly courts have the right to protect themselves and the public interest unless a constitution or statutory provision prohibits it.

II.

ANSWERS TO CONTENTIONS OF PETITIONER

Petitioner contends that the proceeding of the Supreme Court of the State of Colorado was one involving criminal contempt and that the Court failed to comply with the requirements of due process of law and equal protection of laws under the Fourteenth Amendment. He further contends that the Court erred in its distinction between plaintiff and defendant.

The question of procedure in a criminal contempt case was considered by Judge Huxman in *Shotkin v. Burke, et al., supra,* in which the Court stated that the rules that apply to a criminal proceeding do not apply to a proceeding in criminal contempt. The case of *Uveges v. Pennsylvania,* 335 U. S. 437, was a case involving a felony prosecution and hence not applicable to a criminal contempt proceeding.

As to the right of accused to counsel under the Fourteenth Amendment, we refer the Court to an annotation appearing at 93 Law. Ed. 137, 138, as follows:

> "On the other hand, as regards state prosecutions, no provision of the Federal Constitution specifically guarantees a defendant the right to counsel; and the only pertinent provision is the general guaranty of the Fourteenth Amendment that no state shall deprive any person of life, liberty, or property without due process of law.
>
> "Although a denial by a state of rights or priv-

ileges specifically embodied in the Sixth Amendment may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth Amendment, the two constitutional provisions are not coextensive as regards an accused's right to counsel. The Sixth Amendment applies only to trials in Federal courts. On the other hand, the due process of law which the Fourteenth Amendment exacts from the states is not confined by any absolute rule such as that which the Sixth Amendment contains in securing to an accused the assistance of counsel for his defense, does not compel the states to follow the Federal process of law, and does not of its own force require appointment of counsel for one charged in a state court with crimes merely because he would have a constitutional right to the assistance of counsel in a comparable Federal case. Consequently, Rule 44 of the Federal Rules of Criminal Procedure, supra, cannot be regarded as defining, even by way of analogy, the minimum standard of due process required under the Fourteenth Amendment."

It is fundamental that there is a vast difference between a criminal proceeding and a criminal contempt proceeding. Hence it cannot be argued that the requirements that a criminal proceeding must necessarily be adhered to in a criminal contempt proceeding. In this connection we point out that petitioner has failed to cite any authority whatsoever requiring a jury trial and court appointed counsel in a criminal contempt case.

Petitioner further complains that he was not given an opportunity to produce witnesses in open court and was denied oral argument. In this connection we wish to point out that under the Order to Show Cause (R. 6), the petitioner was afforded ample opportunity to present his defenses and to have his day in court. However, petitioner contented himself with filing numerous dilatory motions

and petitions. Although he generally denied the allegations of the complaint in contempt the various statements made by petitioner in his said motions and petitions constituted an admission of the charges, namely that he had instituted various actions and represented himself as a plaintiff without counsel, contrary to the mandate of the Supreme Court of Colorado in *Shotkin v. Kaplan, supra.* Hence it became unnecessary for the court to take testimony. 17 C.J.S. 103.

Petitioner further complains "that the State Supreme Court by staying the operation of its sentence 'until the further order of court' creates an undulating threat of an attainder character." We fail to understand how the suspension of the court's punishment can possibly be prejudicial to the petitioner. Further, we submit that the court has inherent power to suspend its order and that same does not in any way violate any rights of the petitioner under the Federal Constitution.

III.

CONCLUSION

In conclusion, it is respectfully submitted that the petition for writ of certiorari should be denied since there are no special and important reasons for granting same and there is no Federal question of substance involved in the decision of the Colorado Supreme Court. Hence, this Honorable Court has no jurisdiction and should deny certiorari.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. [redacted]69

BERNARD M. SHOTKIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO, ex rel. THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondent.

REPLY BRIEF TO RESPONDENT IN PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 817

BERNARD M. SHOTKIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO, ex rel. THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondent.

REPLY BRIEF TO RESPONDENT IN PETITION FOR WRIT OF CERTIORARI.

Rulings of Contempt by This Court.

This Court recently granted certiorari and considered a state case in which constitutional rights under the Fourteenth Amendment were only slightly involved as compared with the present case. *Fisher* v. *Pace,* 336 U. S. 155. There is in the present case no charge of contempt in open court, and petitioner's limitation to filed motions and petitions presents a record showing that there was no such contempt. In *Cooke* v. *United States,* 267 U. S. 517 (1925), 536, 537, this Court said that when contempt is not in open court

there is "opportunity of the accused to present his defense by witnesses and argument." This Court further said:

> "Due process of law, therefore, in the prosecution of contempt, except that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed."

The present case involves a refusal of due process protection beyond that required in the *Cooke* case by this Court.

The Issues of the Case.

This case was initiated in the Supreme Court of Colorado on the ground of alleged contempt through petitioner's appearances in the trial court without counsel (Rec. 2-6). The appearances related to a state sales tax, and in one of them petitioner was able to act through an attorney (Rec. 57). As previously indicated, the transaction subjected to taxation was one beyond the state, but payment was made by petitioner in order to avoid a complete destruction of his business by the Director of Revenue of the State of Colorado.

The trial court to which the petitioner first presented the matter expressed the opinion that he was really a defendant, and that the opinion of the Supreme Court as to appearance without counsel did not apply (Rec. 60). The trial court had the authority and duty to pass upon such an issue, and the respondent has cautiously avoided any reference to this matter. Although the trial court had a duty to act, petitioner is subjected to a criminal penalty

by the Supreme Court of Colorado for an action approved by the trial court.

While avoiding any reference to the trial court's statement (Rec. 60), respondent bases its position largely upon an unreported opinion not in the record which had no relation to the issue of the Fourteenth Amendment. This Court has before it not only the question above indicated, but also the question as to whether due process of law was employed by the Supreme Court of Colorado in its contempt proceeding.

The Procedure of the Case.

Respondent claims that petitioner had ample opportunity "to present his defenses and to have his day in court" (Respondent's Brief, 12-13), and that he relied upon improper motions and petitions (Respondent's Brief, 4-5). That he had opportunity is claimed upon the fact that the court gave him ten (10) days notice to reply to charges of contempt presented by the Attorney General of Colorado (Rec. 6). Had this been a full authority it would have permitted counsel, witnesses and oral argument.

Applications by petitioner for witnesses and possible oral argument were denied by the Supreme Court of Colorado (Rec. 10, 16, 25).

Although Respondent's Brief (pp. 4-5) lists the motions and petitions presented by petitioner, it in no way refers to the fact that three successive motions were made asking the Court to appoint an attorney to represent petitioner (Rec. 7, 8, 30, 33, 61, 62). The Court was informed that he had been unable to procure counsel, and was asked to appoint an attorney at a reasonable fee. In the third of these motions a check of $100 was filed with a statement of willingness to pay such additional fee as the Court might determine (Rec. 61).

Summary of Matters at Issue.

Each of the three motions for appointment of counsel was denied (Rec. 8, 33, 62). Not only did the Supreme Court of Colorado deny hearing and counsel, but, taking the position that it is contempt for a person to appear in court without counsel, it denies a right of counsel in the Supreme Court to a person prosecuted for contempt in that he acted without counsel before the trial court.

In addition, it must be understood that (1) the alleged contempt was before a trial court; (2) it was the duty of the trial court to construe the principle established by the Supreme Court; (3) the trial court construed the transaction here involved as not controlled by the decision of *Shotkin* v. *Kaplan,* 116 Colo. 295, by the State Supreme Court; and (5) the State Supreme Court punishes as contempt a proceeding construed by the trial court not to require counsel.

Further attention may be brought to the fact that the penalty here involved is one of serious and continuous injury to the petitioner and to his business.

Federal Issues.

With reference to due process of law under the Fourteenth Amendment it is fully established that a penal statute must be explicit. The same rule should apply to a judicial action which creates a criminal offense. A rule so established is not explicit if drawn in such a manner as to be construed differently by its author and by those operating under it. Such is the case in this proceeding. This matter involves a federal question and is discussed in petitioner's brief, pp. 13-14, but not referred to by the respondent.

Petitioner was in this case deprived of counsel, the use of witnesses, and of oral argument (Rec. 10, 16, 25). Respondent contends that rules of criminal proceeding do not apply to criminal contempt, but this is not in full agreement with statements by this Court (Petitioner's Brief, pp. 12-13). *Uveges* v. *Pennsylvania,* 335 U. S. 447, indicates a principle, and respondent's quotation of the annotation of that case in 93 Law Ed. 137, 138, is correct in saying that, with reference to counsel, the Sixth Amendment establishes a broader rule for federal courts than the Fourteenth Amendment does for state courts (Respondent's Brief, pp. 11-12). But the Fourteenth Amendment is a protection and presents a federal question in such protection. And such protection is within the terms of that amendment when a state court may defeat justice by the violation of the very principle which it also purports to be enforcing, and by denying an opportunity to be heard and to call witnesses.

Respectfully submitted,

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Attorney for Petitioner.

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IN THE

Supreme Court of the United States

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No. 69

BERNARD M. SHOTKIN,

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vs.

THE PEOPLE OF THE STATE OF COLORADO, EX REL., THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

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GROUNDS OF PETITION FOR REHEARING.

By its action in this case, and by its action in *Shotkin* v. *Perkins, et al.* (October Term, 1950, 187 Misc.), this Court has (1) sustained an alleged criminal contempt, based upon trial by the Supreme Court of Colorado, with denial to petitioner of counsel, of witnesses, and of oral argument in such trial (Record, 10, 16, 25); (2) Approved a finding of contempt by the State Supreme Court, because of appearance in a trial court by petitioner, with threat of serious penalty at such time as the Court may decide to impose it; (3) Approved such action of the State Supreme Court upon appearance by petitioner in the trial court, the trial court originally handling the case, having, however, ruled such

appearance not to be violative of orders of the State Supreme Court (Record, 60); and (4) It has sustained the State Supreme Court's contempt procedure and applied penalty, with respect to an effort by petitioner to contest the validity of a state sales tax assessment of more than $6,000 which he was coerced to pay, and which was imposed upon sales made in other states to individuals and to the government of the United States, of articles never within the State of Colorado. This Court must be regarded as having approved a refusal of the trial court of the state to give petitioner a hearing when it found against him, this refusal being in accord with orders of the State Supreme Court, and being made by a trial judge other than the one originally charged with the case.

The first three points relate to the application of due process of law under the Fourteenth Amendment; the fourth to a right to contest the invalid application of a state law to interstate commerce.

The action of the Supreme Court of Colorado having defeated a remedy in state courts, petitioner sought a remedy in the United States District Court for the District of Colorado, but received a dismissal on the basis of action previously taken by the state trial court in denying him a hearing, and was not financially able to meet expenses in an attempt to obtain review by the United States Court of Appeals for the Tenth Circuit. Aid in an *in forma pauperis* proceeding to this Court was given by the Chief Judge of Appeals for the Tenth Circuit in permitting the original record in that Court to be employed in this Court, and a petition for certiorari was sought in *Shotkin* v. *Perkins, et al.*, No. 187 Misc., October Term, 1950. This petition, which was denied by this Court on October 16, 1950, deals with the same problem of remedy sought in Federal Courts, state court remedies being exhausted. The same constitutional issue as to a state sales tax upon sales not in the

state is avoided if this Court adheres to its present action, taken within a few days after petitioner's counsel received copies of Respondent's Answer. A reply brief to respondents will be promptly submitted *in forma pauperis,* together with an affidavit, but it is of importance to state that this case and that involve closely related issues.

In view of the position taken as to the cases by this Court, there can be no doubt of the denial of remedies under the Constitution of the United States.

This Court has refused to consider a denial of justice by the Supreme Court of Colorado, and by its trial courts. This denial has led to a similar denial by the United States District Court. Petitioner is thus denied any remedy with respect to a compulsory state sales tax upon sales of articles never in the State of Colorado nor sold therein.

Respectfully submitted,

WALTER F. DODD,
Attorney for Petitioner.

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

WALTER F. DODD,
Attorney for Petitioner.